UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

CY-FAIR VOLUNTEER FIRE DEPARTMENT	§	
	§	
And	§	**CASE NO. 16-CA-107721**
	§	**CASE NO. 16-CA-120055**
ROBERT BERLETH, an individual,	§	
	§	
And	§	**CASE NO. 16-CA-120910**
	§	
CRAIG ARMSTRONG, an Individual.	§	

RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTY BERLETH'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Cy-Fair Volunteer Fire Department ("Respondent" or "Cy-Fair") submits its Answering Brief to Charging Party Berleth's Exceptions and Brief in Support of Exceptions to the Administrative Law Judge's ("ALJ") Decision. For the reasons explained fully in this Answering Brief, Cy-Fair respectfully requests that Berleth's exceptions be overruled.

I.
SUMMARY OF ARGUMENT

It would be hard to find a more clear-cut case of employee misconduct justifying termination than this one. Berleth's tenure as a Paramedic was filled with egregious violations of policy, many of which had the potential to place lives of the public at risk. These incidents included, but were not limited to: (1) allowing a member of the public to drive an ambulance; (2) leaving his territory to bring Starbucks coffee to female nurses; (3) leaving an expensive piece of cardiac equipment at the hospital and not noticing for the rest of his shift; (4) instructing his partner to drive the wrong way on a busy freeway feeder road which resulted in a complaint from the public; and (5) egregious sexual harassment and mistreatment of coworkers which resulted in at least one quitting and citing Berleth as the reason.

In this case, however, the ALJ did not even need to get to the reasons for Berleth's termination because the evidence failed to establish as a threshold matter that Cy-Fair had knowledge of Berleth's union activity prior to the decision to terminate. In fact, the evidence established that Berleth *began* his union activity in response to being suspended with a recommendation to terminate. Accordingly, as a matter of law, there could be no causal link between the decision and the protected activity.

The ALJ's decision in this case is well-reasoned and supported by credibility determinations which should not be disturbed by the Board. Accordingly, Cy-Fair respectfully requests that Berleth's exceptions be overruled.

II.
STATEMENT OF THE CASE

Cy-Fair is one of the largest non-profit volunteer fire departments in the state of Texas, with volunteers and employees on 24-hour rotating shifts in order to provide the public service of fire and emergency protection to its local community. Berleth worked for Cy-Fair as an EMS Paramedic. Berleth had a long history of performance problems, spanning the entire length of his tenure with Cy-Fair, which included, among other problems, harassment of coworkers, insubordinate behavior, tardiness, unsafe use of a vehicle, careless use of equipment, and patient neglect. In total, Berleth received approximately 12 write-ups for his varying performance problems. (Respondent Exhibits 3, 6, 9, 10-13, 19-21, 26-30). In the end, he was suspended and recommended for termination on April 4, 2013 because of continued performance problems, namely – leaving his assigned territory to retrieve Starbucks coffee for nurses at a hospital, failing to respond to a call while working out while on shift, and leaving a cardiac monitor (LifePak 15) at a hospital, all on a single shift. (Respondent Exhibits 28-30).

Employees, such as Berleth, are permitted to appeal these types of disciplinary actions to an Appeals Committee and then to the Board of Directors. (Tr. pp. 510:25-512:3) (Tr. pp. 538:17-539:19; 558:5-23). Ultimately, after appeals at both levels, the recommendation to terminate Berleth's employment was upheld. (Respondent Exhibits 34 and 37).

Following his termination, Berleth filed Unfair Labor Practice charges against Cy-Fair. His Amended Consolidated Complaint alleged, among other things, that Respondent disciplined and discharged him for engaging in union activity in violation of the NLRA. (General Counsel Exhibit 1(x)).

After being postponed and rescheduled several times, including two requests by Berleth which were granted to accommodate his work and law school schedules, the NLRB hearing was scheduled for August 2015. The hearing proceeded on August 12, 13 and 14, 2015, before Administrate Law Judge (ALJ) Joel P. Biblowitz. After three days of evidence, including

testimony from witnesses from all sides, and following Respondent's and the Counsel for the General Counsel's post-hearing briefing, the ALJ issued a Decision finding that Cy-Fair did not discipline or otherwise terminate Berleth in violation of the NLRA. Indeed, the ALJ found that there was no credible evidence establishing that Respondent was aware of Berleth's union activity prior to the decision to suspend and recommend him for termination. (ALJ Decision, at pp. 18-19). Equally as critical, the ALJ ruled that, even in the event the Counsel for the General Counsel had sustained its initial burden (which it did not), he would have found that Respondent sustained its burden to prove it would have terminated Berleth even absent union activity, because of the lack of union animus and the extent of the disciplinary actions against Berleth. (ALJ Decision, at p. 19).

The only violation the ALJ found against Cy-Fair was that certain isolated sections of Respondent's employee handbook, related primarily to policies on blogging, the use of confidential information, social media, and solicitation/distribution, and Kenneth Grayson's distribution of a portion of the solicitation/distribution policy via email, violated section 8(a)(1) of the NLRA. (ALJ Decision, at pp. 5-6, 18, 21). Notably, however, even prior to the ALJ's Decision, Cy-Fair had already implemented changes to those policies to conform to the requirements of the NLRA. Cy-Fair presented unrefuted testimony at the hearing that it had already revised and implemented changes to its employee handbook, modifying the challenged policies in accordance with the guidance from the NLRA. (Tr. pp. 535:24-538:16) (Respondent Exhibits 77, 82). Respondent, at all times, acted in good faith and with every intention of complying with the law prohibiting discrimination in violation of the NLRA.

Now, despite no objections or exceptions to the ALJ's Decision from either Counsel for the General Counsel or Charging Party Armstrong, Berleth has filed exceptions to the ALJ's Decision, complaining of six points, most of which are based entirely on his subjective view that

the ALJ should have assessed the credibility of witnesses in accordance with Berleth's interpretation of their testimony. Rather than accepting that the ALJ, as a neutral arbiter, is in the best position to make credibility determinations based on his consideration of all the evidence, Berleth seeks to have his own biased interpretations of what witnesses meant to say or should have said substituted for the actual evidence in the case. Berleth's exceptions, however, cannot overcome the ALJ's well-reasoned findings.

III.
ARGUMENT AND AUTHORITIES

A. Several Of Berleth's Assertions Either Have No Support In The Record Or Mischaracterize The Record Evidence.

As a threshold matter, Berleth's exceptions and supporting brief are replete with statements that are either 1) wholly unsupported by the record or 2) mischaracterize the record evidence in this case. Under section 102.46 of the Rules and Regulations Procedures for Filing Documents of the NLRB, each exception:

> (i) shall set forth specifically the questions of procedure, fact, law or policy to which exception is taken;
>
> (ii) shall identify the part of the ALJ's decision to which objection is made;
>
> (iii) shall designate by precise citation of page the portions of the record relied on; and
>
> (iv) shall concisely state the grounds for the exception.

See §102.46(b)(1). Berleth relies on his supposed *pro se* status as an excuse for any failings to have access to trial exhibits and/or the hearing record. However, *pro se* status notwithstanding, he is neither absolved nor relieved of the required obligations to accurately identify exceptions and the disagreeable parts of the ALJ's Decision along with citations to the record relied upon to support his position.

Throughout his exceptions, Berleth makes blanketed statements that were not presented as evidence, testimonial or otherwise, during the hearing and, thus, are not supported by the record. For instance, Berleth contends the following:

- In footnote 1, "[s]hortly following the union election and NLRB complaint filing, Assistant Chief of EMS Kenneth Grayson was removed from his position. Even though technically a lateral transfer, his new position carries minimal clout of his previous designation. Furthermore, the entire board of directors of the Respondent was forced to undergo a massive restructuring by the department's governing agency, Harris County Emergency Services District #9. None of the board members that voted to terminate Berleth, save for the President of the Board Jennifer Walls, remain in office." (Brief on Exceptions, at p. 6).

- "During this time Berleth had the strong (and correct) suspicion that Asst. Chief Grayson would summarily discharge anyone threatening his personal fiefdom." (Brief on Exceptions, at p. 7).

- In footnote 2, "By controlling this crucial position Mr. Grayson became an extremely powerful figure within the department and was able to bypass policy on a whim without opposition." (Brief on Exceptions, at p. 8).

- In footnote 5, "[Littrell-Kercho] further resisted the common knowledge that Berleth rode a motorcycle to work nearly every day. During his employment, Littrell-Kercho had several casual conversations both on and off duty with Berleth while seated on the motorcycle." (Brief on Exceptions, at p. 12).

- "It is further established that due to the IAFF rules regarding an "EMS only" union such as the one proposed, a union would have to be formed and then admitted to the IAFF. These several transitions and multiple union cards were performed with the guidance of legal counsel and the knowledge of the other organizing employees." (Brief on Exceptions, at pp. 13-14).

- In footnote 6, "Following Berleth's discharge, the disciplinary board procedures were all changed. An EMS member now sits on the disciplinary board; Berleth received no such accommodation." (Brief on Exceptions, at p. 15).

Berleth fails to cite to any record evidence for these accusations. Rather, they are simply unsupported and unsubstantiated arguments, inadmissible for any purpose, and should be wholly disregarded. Because Berleth failed to comply with the NLRB Rules, specifically by failing to

designate by precise citation of page the portions of the record relied on, his exceptions should be overruled.

B. Berleth's Exception 1: The ALJ Correctly Found That Respondent Was Not Aware Of Berleth's Union Activity Prior To May 17 And That Berleth Would Have Been Terminated In The Absence Of Union Activity.

Berleth excepts to the ALJ's findings that the evidence in this case did not establish that Respondent was aware of union activity prior to May 17, and further excepts to the ALJ's findings that Respondent sustained the burden to prove Berleth's termination was not motivated by his union activity. The record, however, clearly supports the ALJ's findings.

1. Respondent was Not Aware of Berleth's Union Activity Prior to May 17.

Berleth's entire argument rests on the requirement that the Board disregard the credibility determinations made by the ALJ and, instead, substitute Berleth's subjective conclusions about testimony and evidence. In NLRB hearings, it is well-established that an ALJ's credibility determinations are given great weight by the Board. *See Plaza Auto Center, Inc.*, 360 NLRB 117 (2014) (accepting the ALJ's credibility determinations when assessing the nature of the conduct at issue). An ALJ may properly base credibility determinations on the context of a witness' testimony, witness demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *See generally, Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd*. 56 Fed. Appx. 516 (D.C. Cir. 2003); *Tower Industries, Inc.*, 349 NLRB 1327 (2007). Indeed, the Board's established policy is not to overrule an Administrative Law Judge's credibility resolutions ***unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect***. *See Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd*. 188 F.2d 362 (3d Cir. 1951); *see Publix Super Markets, Inc.*, 347 NLRB 1434, fn 2 & 6 (2006)

(emphasis added). A careful examination of the record in this case reveals no basis for reversing this ALJ's findings.

a. Armstrong did not provide credible testimony to establish Respondent's knowledge of Berleth's union activity.

The ALJ rightfully weighed the testimony of Jerry Justice (who denied any discussion with Armstrong about Berleth's involvement with a union) with Armstrong's contradictory hearing and affidavit testimony. While Armstrong alleged that Justice talked about Berleth starting a union sometime in early April 2013, Armstrong also contended that Justice "indicated he was in favor of a union" and that there "needed to be a regime change at the top with the Graysons, and that [the union] was probably going to be the only way to do it." (Tr. pp. 316:18-317:3). Justice, on the other hand, denied making these statements. (Tr. pp. 596:18-23; 602:3-4).

Armstrong admitted that his testimony at the hearing about the conversation with Justice was grossly exaggerated from the affidavit provided to the NLRB. (Tr. p. 604:1-8). In his affidavit submitted prior to the hearing, Armstrong never made any mention of a discussion with Justice mentioning Berleth's involvement with a union. (Tr. p. 604:1-8). It was only until Armstrong testified at the hearing that he suddenly recalled a conversation with Justice where Berleth and the union were both mentioned. Armstrong's conflicting testimony simply failed to demonstrate that Respondent was somehow aware of Berleth's union activity at that time.[1] Clearly, the ALJ was in the best position to test the credibility of Armstrong and Justice and make the determination of who seemed more credible. In the end, assessing witness credibility, the ALJ properly determined that Armstrong's testimony was not credible. (ALJ Decision, at p. 18).

[1] Indeed, as noted by the ALJ, Armstrong contended Justice was actually in favor of a union (Tr. pp. 316:18-317:3), so it is illogical to presume that Justice would have notified Respondent of any union activity or otherwise discriminated against a union supporter. (ALJ Decision, at p. 18).

b. Littrell-Kercho was not aware of Berleth's union activity.

During the hearing, Counsel for the General Counsel attempted (but failed) to demonstrate that one of Berleth's supervisors, Littrell-Kercho, learned of Berleth's union activity when she attended a non-work related event with her husband. However, Littrell-Kercho testified that she did not participate in the conversation where union activity was allegedly discussed and she did not recall what the conversation entailed. (Tr. pp. 500:25-501:20). Ultimately, the ALJ found this testimony was simply "too tenuous to establish that the Respondent had knowledge of Berleth's union activities at the time." (ALJ Decision, at p. 18). In his exception, Berleth offers nothing more than speculation that Littrell-Kercho was in any way aware of the substance of the conversation, which is simply wholly insufficient to demonstrate that Respondent was aware of his union activity. Littrell-Kercho, on the other hand, unequivocally testified that she had no knowledge of any union activity by Berleth when she made the employment decisions affecting him. (Tr. pp. 97:19-25; 472:20-473:4).

Nothing in the record demonstrates the ALJ's findings were wrong. Certainly, there is no clear preponderance of the evidence demonstrating that the ALJ was incorrect. Importantly, even Berleth acknowledges that his own witness' testimony (Eddie Flemmons) about the timeline of Berleth's alleged union activity was confusing and unclear (Brief on Exceptions, at p. 16), failing to demonstrate anything possible, much less, definitive, about what and when, if anything at all, Respondent knew. Yet, Berleth would now credit Flemmons' testimony as "an innocent oversight." The ALJ, however, rightfully concluded that the testimony was exactly what it was – insufficient to demonstrate knowledge by Respondent. (ALJ Decision, at p. 18).

c. Respondent learned of Berleth's union activity on May 17.

The first time Cy-Fair received notice that Berleth was involved in union organizing was when it received a fax on Friday, May 17, 2013 of an unofficial copy of the petition for election

filed by Berleth. (Respondent Exhibit 16).[2] Berleth's own testimony acknowledges Respondent did not have knowledge of his union organizing until they received his petition.

> Q. Sure. Before April 4th 2013, which is when you were give notice that you were suspended pending termination, you don't have any knowledge that Cy-Fair had knowledge you were union organizing.
>
> A. I didn't have - - they didn't have any confirmed knowledge until May 17th, 2013.
>
> Q. And why - - what - - why is that day significant?
>
> A. Because that's the day that they received notice of the election.
>
> Q. Okay.
>
> A. Before that, everything is vague, what they knew and what they didn't know.

(Tr. p. 271:7-18). Not surprisingly, Berleth faxed the petition for election just prior to his final appeal hearing meeting already scheduled for Monday, May 20, 2013. (Respondent Exhibits 16 and 37).

Despite that, there was no mention whatsoever of union activity at the Board of Director's meeting on May 20 when the decision was made to ultimately terminate Berleth's employment (Tr. pp. 512:4-513:23), and no evidence that the appeals committee or Board of Directors were aware of any union activity by Berleth (Tr. p. 103:15-104:16), and no discussion with Berleth about his union activity (Tr. pp. 274:20-275:1; 275:17-19). Weighing that evidence against the anemic and unreliable paucity of evidence presented by the General Counsel, the ALJ properly concluded there was no credible evidence that Respondent was aware of Berleth's union activity before the recommendation to terminate his employment. (ALJ Decision, at p. 18).

[22] Even as late as May 14, after Berleth had already been recommended for termination, Kenneth Grayson sent an email indicating he knew nothing about an attempt to form a union. (Respondent Exhibit 87).

2. Counsel for the General Counsel did Not Make a *Prima Facie* Case of Wrongful Termination Under *Wright Line*, but Even if it Had, the ALJ Properly Found that Berleth Would Have Been Terminated in the Absence of Union Activity.

A well-recognized two-step analysis is utilized to determine whether the General Counsel has proven that an employer has discharged an employee in violation of Section 8 (a)(3) of the Act. *See Wright-Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). The NLRB has the initial burden to establish a *prima facie* case that the discharged employee's union activity was a motivating factor in the employer's decision. *Overnight Transportation Co.*, 343 NLRB 1431, 1433 (2004). To do this, the General Counsel must demonstrate that: (1) the employee engaged in union activity; (2) the employer was aware of this activity; (3) there is a link between the employee's activity and the discharge decision; and (4) the employer harbored anti-union animus. If the NLRB fails to present evidence on all four of these points, the Board must find that the employer has not violated Section 8 (a)(3) of the Act. *(Id.).* On the other hand, if, and only if, the General Counsel successfully makes out the *prima facie* case, does the burden shift to the employer to prove by a preponderance of the evidence that it would have taken the same action regardless of the employee's union activity. *Wright-Line*, 251 NLRB 1083 at 1089. If the employer is able to prove that it would have taken the same action in the absence of any union activity, the NLRB must rule that no violation of Section 8 (a)(3) has occurred. *(Id.)*

In this case, the ALJ determined that the General Counsel failed to sustain its initial burden. (ALJ Decision, at p. 19). Therefore, the burden did not shift to Cy-Fair to demonstrate that it would have terminated Berleth absent union activity, as Berleth incorrectly presumes in his exception. Where, as here, the General Counsel fails to meet its initial burden, the ALJ is not required to, and did not, conduct any further analysis on Respondent's burden, or shift the burden to Respondent. In fact, the ALJ only noted that "even if [he] had found that the General Counsel had sustained his initial burden herein, because of the lack of union animus and the extent of the

disciplinary actions against him, [he] ***would have found*** that the Respondent has sustained its burden that it would have terminated him even absent his union activity." (ALJ Decision, p. at 19) (emphasis added). But even this conclusion by the ALJ is supported by the weight of the evidence.

a. Berleth's performance problems and discipline spanned his entire tenure, occurring both before and after his protected activity.

Throughout his tenure employed by Cy-Fair, Berleth received approximately 12 write-ups for his varying performance problems. (Respondent Exhibits 3, 6, 9, 10-13, 19-21, 26-30). There was no evidence that any of these write-ups were fabricated or even exaggerated. Indeed, Berleth's own hearing testimony acknowledges that each of these incidents, in fact, happened, and that the overwhelming majority of them had nothing to do with any union activity. (Tr. p. 217:11-14) (Tr. p. 220:8-11) (Tr. pp. 223:24-224:2) (Tr. p. 226:13-16) (Tr. p. 227:19-21) (Tr. p. 229:19-20) (Tr. p. 236:23-25) (Tr. p. 238:2-5). Only with respect to the last few incidents did Berleth's testimony change from decidedly not a factor to he didn't know if his activity was a factor. (Tr. p. 240:2-6). Simply put, even Berleth could not conclude that he was wrongfully terminated. At best, he was unsure. The fact that Berleth's record of discipline spanned the time both before and after his alleged protected activity, and that Cy-Fair had legitimate reasons to discipline Berleth, is convincing evidence that Berleth would have been terminated in the absence of protected activity.

b. Berleth was demoted from the FTO position because of poor performance.

Berleth completely disregards the mountain of evidence demonstrating the legitimate reasons for his termination. Instead, he illogically argues that discipline received early in his tenure should be discounted, and a "2011 promotion to FTO" qualifies him as an "elite paramedic." (Brief on Exceptions, at p. 6). Berleth's argument completely ignores the fact that he continued to be disciplined for infractions throughout his entire tenure, and was *demoted* from

that same FTO because of continued performance problems, long before any alleged union activity. (Respondent Exhibits 23 and 24). While in the FTO role, Berleth was disciplined for the major offense of unsafe use of a vehicle on December 17, 2012. (Respondent Exhibit 21). More specifically, he directed his partner to turn into traffic on the service road of a major freeway, resulting in a civilian complaint. (*Id.*; Tr. p. 85:20-21). Because of this gross lapse in judgment, Berleth was removed from FTO status and received a written warning. (Tr. p. 86:7-16) (Respondent Exhibits 21 and 24). Suffice it to say, Berleth's 2011 promotion to FTO hardly demonstrates that he was a stellar employee being subjected to trumped-up discipline in 2013, when he was demoted from the position because of performance problems before any alleged issues about the union ever surfaced.

c. Respondent disciplined other employees in a similar fashion, and neither singled out nor targeted Berleth for discipline.

Berleth unconvincingly attempts to compare his long history of performance problems with the disciplinary records of Jason Miller. (Brief on Exceptions, at pp. 9-10). What is markedly different about these two employees is that Miller did not have anywhere near the number of disciplinary write ups as Berleth. Moreover, while Berleth attempts to disingenuously compare his leaving an expensive LifePak at a hospital to the circumstances for which Miller was disciplined, the stark difference is that Miller and his partner immediately recognized their mistake while still on shift, and then called in to dispatch to make plans to retrieve it. (General Counsel Exhibit 11). Berleth, on the other hand, never even knew his equipment had been left behind until a crew member from another shift, that needed the equipment, brought it to his attention. (Tr. pp. 261:3-20; 465:25-466:10; 468:16-24). Even then, once Berleth recognized the gravity of the mistake, he displayed a cavalier attitude in retrieving the equipment. (Tr. pp. 469:14-16; 491:19-21).

Berleth also misrepresents the testimony to say no other employee had been disciplined for failing to answer an emergency call, being out of territory or leaving equipment behind at the scene. However, Berleth's partner, Omar Dar, was also, disciplined for being out of his territory and failing to respond and for leaving behind the LifePak equipment. (Respondent Exhibit 92, Cy-Fair 1476-1479). Indeed, Respondent offered evidence of many other employees who were disciplined for engaging in acts similar to Berleth. (Respondent Exhibit 92).

d. Respondent did not harbor anti-union animus.

Counsel for the General Counsel also failed to demonstrate anti-union animus. The only member of Cy-Fair management against whom the General Counsel even attempted to establish an anti-union bias was Kenneth Grayson. However, Grayson is, in fact, a member of the International Association of Firefighters ("IAFF") in his second job at the Houston Fire Department, and has been a union member for many years. (Tr. pp. 46:8-47:1) (Tr. p. 73:1-2; 73:22-23).

Furthermore, no Cy-Fair employees were disciplined or counseled for handing out union cards. (Tr. p. 112:19-22). In fact, Grayson advised an employee, Nate Blue, that it was permissible to send out emails to employees during the union campaign. (Tr. p. 47:2-24). Even Berleth admitted he sent emails about his union campaign using Respondent's email system even after he had been terminated, and no one at Respondent took issue with his distribution. (Tr. pp. 278:12-270:6).

The credible evidence clearly supports the ALJ's findings that Respondent would have terminated Berleth even absent union activity because of the extent of the discipline against Berleth and the lack of union animus. Berleth's exception should, therefore, be overruled.

C. Berleth's Exception 2: The ALJ Correctly Found That No Testimony Was Adduced At The Hearing Establishing That The Union Was A Labor Organization Within The Meaning Of Section 2(5) Of The Act.

Berleth's exception to the ALJ's supposed failure to define the Labor Organization Status in Section II of the ALJ Decision should be rejected. The General Counsel claimed that Berleth was an organizer for the Cy-Fair Volunteer Fire Department EMS Employees Association, but failed to offer any evidence about this union, its creation or activities. Berleth cites to the record, "TR 196", to demonstrate that he, with the assistance of counsel, organized and arranged meetings with the IAFF, however that is not the union in question. Additionally, Berleth makes blanket statements about IAFF rule requirements, none of which were either offered as evidence, testimonial or otherwise, or cited to by Berleth in his supporting Brief. Thus, his exception does not conform to Rule 102.46(b)(1) and should, therefore, be overruled.

Further, contrary to Berleth's contention, it is not the province of the ALJ to define the Labor Organization Status if one is not established by the evidence. Consequently, the ALJ did not err in his finding that no testimony was adduced at the hearing establishing that the union was a labor organization within the meaning of Section 2(5) of the Act. In any event, the finding was irrelevant to the ALJ's analysis of the merits and is a moot point for appeal.

D. Berleth's Exception 3: The ALJ Correctly Found That Berleth Was Suspended Pending Termination On April 4.

The record firmly establishes that, as a result of multiple incidents on March 29, including insubordination and careless use of equipment, Berleth received a 30-day suspension with a recommendation of termination on April 4, 2013. (Respondent Exhibit 29). Indeed, Berleth notified Respondent of his intention to appeal the suspension and decision to terminate. (Respondent Exhibit 31).

Berleth then showed up for work on May 6, 2013, arguing that his original 30 days had expired and he should be allowed to work. (Respondent Exhibit 35). Kenneth Grayson testified that the suspension was intended to be long enough for the appeals process to run its course, but

because of the timing, the final appeal could not be scheduled before the 30 days expired. (Tr. pp. 104:19-105:20). Accordingly, Berleth's suspension was ***extended*** to six months, pending termination. (Respondent Exhibit 35).

Contrary to Berleth's contention, he did not receive a second suspension on May 6. Rather, the suspension and recommendation to terminate unequivocally occurred on April 4. Indeed, Berleth's notices to appeal the decisions to uphold his suspension and recommendation were all related to the suspension and recommendation that occurred on April 4. (Respondent Exhibit 36). And, when the Board of Directors held a hearing on May 20, 2013, its decision to terminate was based on Berleth's **April 4** disciplinary write ups and prior disciplinary history. (Respondent Exhibit 37). Put simply, the initial suspension and recommendation of termination was issued ***before*** Berleth's union organizing. The ALJ got it right, and this exception should be overruled.

E. Berleth's Exception 4: The ALJ Correctly Found That Protected Activity Was Not A Motivating Factor In Berleth's Discharge.

For the same reasons articulated in response to Berleth's Exception 1, the ALJ correctly found that Counsel for the General Counsel failed to satisfy its initial burden of making out a *prima facie* case sufficient to support the inference that any protected conduct was a motivating factor in the decision to terminate Berleth. Berleth's exception ignores a critical piece of the timeline in this case – that is, Respondent suspended Berleth on April 4, 2013 with a recommendation of termination. (Respondent Exhibit 29).[3] Berleth appealed his suspension and recommended termination, and a hearing was conducted on April 29, 2013. (Respondent Exhibit 33). The Appeals Committee upheld Berleth's termination. (Respondent Exhibit 34). Thus, the decision had already been made as of April 4, 2013, and affirmed by an Appeals Committee on April 29, 2013. Not a single Appeals Committee member had knowledge of any protected

[3] Both of the supervisors who signed the suspension, Littrell-Kercho and Kenneth Grayson, testified they had no knowledge of any union activity by Berleth as of that date. (Tr. pp. 97:23-25; 472:20-473:4).

activity by Berleth and, hence, did not consider any such activity in its decision. (Tr. p. 513:11-23). Significantly, Berleth admitted (after being impeached with his own affidavit) that his union organizing began only after he was terminated on April 4 and was in direct response to the decision (not the other way around). (Tr. 268:16-269:18).

Equally as important is the fact that Berleth's record of discipline spanned his entire tenure and extended during the time period ***both before and after*** his alleged protected activity. He was not targeted and disciplined after engaging in union organizing. Rather, he was disciplined throughout his employment, and his termination was caused by his own misconduct.

F. Berleth's Exception 5: The ALJ's Inadvertent Use Of The Word "Email" Is Of No Consequence To The Final Decision.

Berleth's exception to the ALJ's inadvertent reference to "emails" as opposed to verbal communications occurring on November 9, 2009, when Berleth was disciplined for sexual harassment, is of no consequence to the ALJ's final determination and Decision in this case. It is undisputed that Berleth used completely inappropriate and disrespectful obscenities to refer to his female coworkers and supervisors. (Respondent Exhibit 3). Berleth readily admitted to this conduct during his testimony, and further admitted that the punishment he received was before any union organizing and had nothing to do with his union activity. (Tr. p. 217:11-14).[4] Therefore, nothing about the ALJ's finding that Berleth harassed a coworker through written, as opposed to verbal, communication constitutes error or detracts from the point the ALJ was making – namely that insulting and unwelcome harassment cannot be compared to friendly (albeit colorful) joking between two friends of the same gender.

[4] Notably, Berleth did, in fact, author an email on November 9, 2009 wherein he admitted to making "an inappropriate comment about another staff member . . ." (Respondent Exhibit 3, Cy-Fair 0167).

G. Berleth's Exception 6: Berleth Cannot Except To The ALJ's Failure To Make A Finding On Matters Not Alleged In The Consolidated Complaint.

Berleth's sixth exception is meritless. He excepts to the ALJ's finding that the Respondent did not further violate the Act as alleged in the complaint (ALJ Decision, at p. 21), relying solely on Kenneth Grayson's distribution of the May 17, 2013 email and holding an informational meeting with the employees about the possibility of a union presumably as evidence that the Act was further violated. However, the Consolidated Complaint raises no specific allegation that Grayson's conduct further violated the NLRA in any other way beyond that already found by the ALJ to be in violation of Section (a)(1) of the Act. The only allegation in the Consolidated Complaint specific to Kenneth Grayson is found at paragraph 9(b), wherein Berleth avers that Kenneth Grayson distributed an email to employees on May 17, 2013 that threatened discipline and discharge for violating the No Solicitation/Distribution policy. (General Counsel Exhibit 1(x)). Nothing in the Consolidated Complaint alleges Kenneth Grayson further violated the Act in any other manner. Berleth cannot except to an issue that was neither alleged in the Complaint, nor litigated during the hearing, nor briefed by the parties. *See generally NLRB v. Coca Cola Bottling Co. of Buffalo, Inc.*, 811 F.2d 82, 87 (2nd Cir. 1987); *Pergament United Sales*, 296 NLRBNRL 333, 334 (1989), *enforced* 920 F.2d 130, 134 (2nd Cir. 1990). Therefore, there is no basis for Berleth's exception.

IV.
CONCLUSION

The record evidence clearly demonstrates that Respondent terminated Berleth after a long and well-documented history of performance problems that spanned more than three years and a host of different supervisors. For all of the foregoing reasons, Respondent requests that Berleth's exceptions be overruled, and that the conclusion of the ALJ be affirmed.

Respectfully submitted,

COZEN O'CONNOR, P.C.

/s/ *David L. Barron*

David L. Barron
State Bar No. 00798051
Norasha L. Williams
State Bar No. 24013759
LyondellBasell Tower
1221 McKinney Street, Suite 2900
Houston, Texas 77010
Telephone: (832) 214-3900
Facsimile: (832) 214-3905
dlbarron@cozen.com
nwilliams@cozen.com

ATTORNEYS FOR RESPONDENT
CY-FAIR VOLUNTEER FIRE DEPARTMENT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Respondent's Answering Brief* has been forwarded by certified mail, return receipt requested, and/or email upon the following parties of record on this 15th day of January 2016:

Robert Berleth
P.O. Box 692293
Houston, TX 77269-2293
Via email: robert@greystonems.com

Craig Aaron Armstrong
8412 Robinson
Pearland, TX 77581
Via email: Craig7295@gmail.com

David A. Foley
Counsel for the General Counsel
Martha Kinard
Regional Director
Timothy L. Watson
Acting Regional Director
National Labor Relations Board
Region 16
819 Taylor St Rm 8A24
Fort Worth, TX 76102-6107
Via email: david.foley@nlrb.gov
Via email: martha.kinard@nlrb.gov
Via email: timothy.watson@nlrb.gov

Fredric D. Roberson, Attorney
National Labor Relations Board, Region 25
575 N. Pennsylvania Street, Room 238
Indianapolis, IN 462049
Via email: fredric.roberson@nlrb.gov

Linda Reeder
National Labor Relations Board
Region 16
819 Taylor St., Room 8A24
Fort Worth, TX 76102-6107
Via email: linda.reeder@nlrb.gov

/s/ David L. Barron
David L. Barron

25351328\3